No. 71-1487

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

CONFEDERATION LIFE INSURANCE COMPANY,
Petitioner,

v.

HECTOR DE LARA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In the light of respondents' brief in opposition, it is abundantly clear that certiorari should be granted. Respondents have not sought to distinguish but have simply ignored the two principal decisions of this Court discussed in the petition that impose governing rules of federal law squarely inconsistent with the decision below.[1] Nor have respondents denied that this case is of great practical and precedential importance and

[1] *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964); *Home Ins. Co.* v. *Dick*, 281 U.S. 397 (1930). See Pet. 13-14, 20-24.

will, unless reviewed, result in millions of dollars in losses for petitioner and other Canadian insurance companies similarly situated. See Pet. 15-16; pp. 3-5, *infra*. Instead, in urging that the judgment below not be reviewed, respondents have tried to sustain the decision of the Florida Supreme Court on a ground never mentioned by that court and impossible to justify on the existing record.

Respondents seek to create the impression that the Florida Supreme Court, in accordance with local choice of law rules, routinely applied Canadian law to determine obligations of a Canadian insurer. This conception of the case bears no relationship to reality. The Florida Supreme Court applied the substantive law of *Florida* to a transaction with which Florida had no connection; Canadian law was not even mentioned by the Florida Supreme Court; and the transaction is a *Cuban* one directly affected by Cuban acts of state that the Florida courts have sought to disregard. See pp. 5-8, *infra*

Respondents assert that the petition contains a "cleverly constructed argument and . . . hullabaloo about violations of international law . . . ." Resp. Br. 7. The action of the Florida courts does involve a violation of international law and thereby establishes a precedent with serious implications for American companies doing business abroad, but that issue is only one of three federal questions presented. The drastic alteration by the court below of rights and obligations of the parties growing out of a wholly foreign transaction also conflicts with a settled line of decisions in this Court construing the Due Process Clause. See Pet. 11-16. Finally, the lower court's disregard of applicable Cuban acts of state dating back to 1951,

well before the Castro regime came to power, violates this Court's act of state doctrine. See Pet. 20-23; pp. 9-10, *infra*.

1. Several events since the filing of the petition confirm and reinforce the reasons previously given why plenary review by this Court of the substantial federal questions just mentioned is appropriate. The lower courts have continued to decide cases involving Cuban insurance policies issued by foreign insurers and have continued to differ radically in their conclusions.[2] Confederation alone is currently involved in about 14 such cases in the state and federal courts in Florida as well as additional cases in other jurisdictions. Potentially a vast number of similar cases involving Confederation may reasonably be expected to arise in the American courts. See Pet. 16. Other Canadian life insurance companies face comparable litigation.

Repeated, time-consuming litigation revolving around the same fundamental questions is not a fruitful use of legal resources. Yet unless and until this Court speaks, lower state and federal courts will continue to reach irreconcilable results despite the presence of controlling federal questions. It has, of course, been a traditional office of this Court to ensure that recurring federal questions are decided in the same way. Sup.

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[2] In *Arida Conte* v. *Confederation Life Ass'n*, No. 41,888, Fla. Sup. Ct., decided July 19, 1972, the Florida Supreme Court followed the decision below in awarding a judgment in dollars for the apparent face value of a Cuban endowment policy. Another recent example is *Santovenia* v. *Confederation Life Ass'n*, No. 71-2928, 5th Cir., decided May 31, 1972. There, on the particular facts the Court of Appeals for the Fifth Circuit affirmed a denial of recovery and distinguished the decision sought to be reviewed in the present case.

Ct. R. 19. This role is even more important where, as here, the same questions are being presented in a wide variety of state and federal forums.

A further development is the submission by the Canadian Government of a note, transmitted to this Court through the State Department and the Solicitor General, urging plenary consideration of the issues. The Canadian Government's legitimate interest rests upon the fact that 10 major Canadian life insurance companies may be adversely affected by the decision below and their foreign insurance policies exceed $1 billion in cash surrender value. As the Canadian note observes, the approach taken by the Florida Supreme Court not only would help foreign policyholders to evade their own countries' foreign exchange regulations but would threaten the insurers with depletion of their dollar reserves by requiring them to pay in dollars claims for which reserves are normally maintained locally and in local currency.

This Court has previously given due consideration to the position of foreign governments in deciding whether substantial federal questions raised by petitions for certiorari warranted plenary consideration. For example, in *Lauritzen* v. *Larsen,* 345 U.S. 571 (1953), the Danish and Norwegian Governments, among others, supported requests for plenary review which this Court granted. See 344 U.S. at 810. Certainly the submission by the Canadian Government establishes that the consequences of the lower court's approach are not limited to the petitioner alone but threaten to have a severe adverse effect throughout the entire Canadian insurance industry.

Finally, this Court's recent decision in *M/S Bremen* v. *Zapata Off-Shore Co.,* 40 U.S.L. Wk. 4672 (June 12,

1972), confirms that it is also important to consider the implications of this case for American businesses operating abroad. In that decision, following the tradition of the *Lauritzen* case (see p. 4, *supra,* and Pet. 19-20), this Court stated that American foreign commerce would not be assisted by a "parochial concept that all disputes must be resolved under our laws and in our courts." 40 U.S.L. Wk. at 4674. If the Florida courts are allowed to apply their own substantive rules of law to govern transactions not connected with Florida in any significant way, American companies will not be in a position to complain when foreign governments disregard fundamental considerations of fairness and jurisdiction to rewrite contracts made in this country.

2. In opposing the grant of certiorari, respondents' answering brief does not take direct issue with the authorities cited in the petition to show that Florida may not apply its own substantive law to a transaction with which it has no substantial contact. Nor do respondents deny that the case has great precedential importance.[3] Rather, respondents adopt the position that there is no legal infirmity because, they assert, Florida applied Canadian law to the transaction and Canadian courts would allow recovery against the insurer in similar circumstances. Respondents are incorrect on both points.

The Florida Supreme Court, whose judgment is sought to be reviewed, did not in any way rely on

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[3] Respondents originally brought this action as a class action, asserting that the questions involved affect a class which "is so numerous that a joinder of all member parties is impracticable" (A. 4-5). For other reasons the trial court did not permit the case to proceed as a class action, but its precedential significance is obvious.

Canadian law or even refer to any Canadian statute or decision. That court described the insurance policy here involved as one "applied for, and delivered, in Cuba" (Pet. 8a) and it had previously described a Confederation policy made in exactly the same way as this one as "covered by Cuban law." *Confederation Life Ass'n* v. *Ugalde,* 164 So.2d 1, 2 (Fla. 1964), *cert. denied,* 379 U.S. 915 (1965).

The express basis of the lower court's decision was that "the instant situation" falls "within the ambit of the rationale of Confederation Life Association v. Vega, supra." Pet. 10a. In *Vega,* the Florida court applied *Florida* law to determine Confederation's obligations with respect to the cash surrender option of one of its Cuban policies where that option was exercised in Florida.[4] Having established a purported basis for applying Florida law that is not available here (see n.4, *supra*), the *Vega* court allowed recovery on "equitable principles" employed by the Florida chancellor. 207 So.2d at 38. In the present case, the Florida Supreme Court's reliance on *Vega,* however illogical, obviously means that it was applying Florida law, not Canadian law.

Respondents base their claim that Canadian law was applied upon the trial court's opinion which, as

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[4] See *Confederation Life Ass'n* v. *Vega,* 207 So.2d 33 (Fla. Dist. Ct. App.), *aff'd,* 211 So.2d 169 (Fla.), *cert. denied,* 393 U.S. 980 (1968). The intermediate Florida court, whose opinion was adopted by the Florida Supreme Court, justified the application of Florida law on the ground that the exercise of the cash surrender option was "the last act necessary to complete the contract, and it was performed in Florida." 207 So.2d at 37. In the present case, there is no cash surrender option involved, and the principle of *lex loci contractus,* which the *Vega* court used to invoke Florida law, here requires the application of Cuban law.

an alternative to *Vega,* asserted that the contract here involved was made in Canada. Resp. Br. 5. It is sufficient answer that that court's alternative assertion was never adopted by the Florida Supreme Court—and for good reason since Confederation's Cuban insurance contracts were in fact made in Cuba. In any event, the judgment of the Florida Supreme Court must stand or fall on the only ground advanced for it, *i.e.,* the application of Florida law to the claim here involved. It bears repeating, however, that the alternative assertion of the trial court appears in an opinion prepared by the respondents' counsel and, being without any basis in the record, could not insulate the federal errors from review in any event. See Pet. 4, n.3.

Since the Florida Supreme Court did not rest on Canadian law, the question what a Canadian court might do in comparable circumstances is not directly relevant, but respondents also err in suggesting that this case would be governed in a Canadian court by *Imperial Life Assurance Co. of Canada* v. *Colmenares,* [1967] Can. L. Rep. 443 (Sup. Ct.). There the Canadian court found that another Canadian insurance company's contract insuring the life of a Cuban resident had been made *in Canada* because the Cuban resident had submitted an application to the Canadian company which committed him irrevocably to accept the policy when issued. *Id.* at 445-47. The court thus deemed the insurance contract to be completed when the irrevocable offer was accepted by the mailing of the policy from the company's home office in Canada. See *id.* at 447. In the present case, Confederation's own application form contains no such irrevocable acceptance clause. No contract of insurance existed until the Confederation policy was delivered to the insured in Havana, until it was notarized according to Cuban

law, and until payment of the first premium was made in Havana. See Pet. 4; A.36.[5]

Even more important, in *Colmenares* the policy involved, unlike the policy in this case, did not specify Cuba as the place of payment. On the contrary, it provided that payment could be made anywhere and that all payments should be made "by bank draft drawn on New York." P. 1a, *infra*. In this case the Confederation policy specifies that all payments are to be made in Havana (A. 29). This circumstance, quite apart from other Cuban contacts, suffices to make the transaction subject to Cuban currency laws, which require the payment of debts payable in Cuba to be made solely in pesos. See Pet. 4-6.

In short, the only ground advanced by respondents for denying the petition for certiorari is irrelevant to this case. It rests on the demonstrably mistaken premises that the Florida Supreme Court applied Canadian law in this case and that under Canadian law respondents could recover in dollars outside Cuba on a Cuban policy explicitly payable in Cuba and required by Cuban law to be paid in pesos. The Florida Supreme Court did not even hint at the applicability of Canadian law and certainly did not purport to adopt respondents' construction of it. This is not surprising in the light of the substantial differences between this case and *Colmenares,* which is the only source of Canadian law that respondents can point to as advancing their claim that they are entitled to recover in dollars outside Cuba.

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[5] The relevant clauses in the application and policy involved in the *Colmenares* case are reproduced in the Appendix to this reply. Comparison of the application and policy involved in this case, which are reproduced at A. 23-44, readily demonstrates the pertinent differences between the two policies.

3. Since the petition for certiorari was filed, this Court has once again reaffirmed the act of state doctrine in *First Nat'l City Bank* v. *Banco Nacional de Cuba,* 40 U.S.L. Wk. 4652 (June 7, 1972). This doctrine, which the court below contravened by ignoring the effect of Cuban currency regulations on obligations payable in Cuba, is of special importance here in the light of respondents' attempt to invoke Canadian law. For, even if a Canadian court would disregard Cuban currency regulations in adjudicating a debt expressly payable in Cuba—and there is no showing that it would—this would not entitle an American court to do so in violation of the act of state doctrine, which applies to state and federal courts alike.

As the petition established, the insurance policy here involved represented an obligation contracted with a Cuban citizen, by the Cuban office of Confederation, to pay money in Cuba. Pet. 4-5. Long before the Castro revolution, the Cuban Government enacted currency regulations depriving the United States dollar, in which the contract was originally expressed, of its status as legal tender in Cuba. Certainly it was within Cuba's authority to enact currency regulations that, as applied to Confederation's policies, "in effect changed the contract from a dollar contract to a peso contract." *Johansen* v. *Confederation Life Ass'n,* 312 F. Supp. 1056, 1063 (S.D.N.Y. 1970), *aff'd,* 447 F.2d 175 (2d Cir. 1971). The United States has enacted comparable legislation—*e.g.,* the Gold Clause Resolution of 1933, 48 Stat. 112, which converted gold debts into dollar debts—and measures of this kind are recognized as conventional acts of state.[6]

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[6] See *French* v. *Banco Nacional de Cuba,* 23 N.Y.2d 46, 242 N.E.2d 704 (1968); *Restatement (Second), Foreign Relations Law of the United States* § 41 & comment d (1965).

Under the act of state doctrine as articulated by this Court on a number of occasions, Florida could not enforce Confederation's Cuban contractual obligations while ignoring the definition and limitation of those obligations by the Cuban act of state. Whatever a Canadian court might do in such a case, the act of state doctrine requires that American courts must accept such a foreign act of state "as a rule for their decision." *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 418 (1964), quoting *Ricaud* v. *American Metal Co.,* 246 U.S. 304, 309 (1918). Demonstrably, the Florida courts did not accept but rather ignored or rejected the Cuban act of state relevant to the present transaction.[7]

None of the recognized exceptions to the act of state doctrine have any bearing on this case. The State Department has not filed a "Bernstein" suggestion, no counterclaim is involved, and the Hickenlooper Amendment does not apply for several reasons, most importantly because the Cuban act of state is not even arguably in violation of international law. See Pet. 23, n.16. The operation of Cuba's currency regulations upon an obligation made in Cuba, with a Cuban citizen, and payable in Cuba is as legitimate and familiar an act of state as America's gold clause legislation previously cited.

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[7] Respondents' assertion that Cuba is not a member of the International Monetary Fund and that the United States is not obliged by treaty to respect Cuban law is wholly irrelevant, since the act of state doctrine does not depend on commitments by the United States to international organizations or specific countries.

CONCLUSION

For the reasons stated the petition for certiorari should be granted.

Respectfully submitted,

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Extract from translated insurance application form involved in *Imperial Life Assurance Co. of Canada* v. *Colmenares,* [1967] Can. L. Rep. 443 (Sup. Ct.):

> "I, the Applicant, agree as follows: (1) That in consideration of the expense incurred hereunder by the Company I will accept the policy applied for, if issued, and pay the first premium thereon; . . . ."

Extract from translated insurance policy form involved in *Imperial Life Assurance Co. of Canada* v. *Colmenares, supra:*

> "PAYMENTS
>
> "The premiums hereunder are payable at any office of the Company or to any duly authorized agent producing the Company's printed official receipt therefor, signed by at least one of the executive officers and countersigned by such agent. No person has authority to receive renewal premiums after the expiry of the grace period provided in this policy.
>
> "All payments under this policy whether to or by the Company shall be made by bank draft drawn on New York payable in lawful currency of the United States of America."